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In the Supreme Court of the United States

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA AND INTERSTATE
Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

I

Opposing counsel cite the language of Senator Jones (Washington), a member of the Senate Committee on Interoceanic Canals, who spoke to the Panama Canal Bill in Committee of the Whole. (Br. 20.)

Representative Adamson, from the Committee on Interstate and Foreign Commerce of the House of Representatives, submitted the report on the operation of the Panama Canal, which contains the following statement on Section 11 (House Reports, Vol. 2, 62nd Cong., 2d Session, 1911-1912, Report No. 423):

(1)

Believing that the function of the canal management to maintain equality and fairness "in respect of conditions and charges of traffic" is limited to the operation and supply, and must be applied at the canal itself, and there only, without attempting to adjust inequalities or equalize conditions in different countries of the world, the committee nevertheless recognizes that the coast-to-coast business through the canal, under existing navigation laws, will be a part of our coastwise trade. It is competent in this or an independent bill to legislate concerning coastwise traffic. It would not be fair to discriminate among our coastwise vessels, all of which are important. The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the act to regulate commerce, the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing,

and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lake and rivers. *This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in the foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to the people living many hundreds of miles inland from both coasts. (Italics ours.)*

II

Counsel for New York Central state the "evidence before the * * * Commission may be summarized briefly." Their summary consists of three printed pages. (Br. 10.) The agreed narrative (R. 52, 53) of the evidence covers 71 pages of the printed record (R. 55-126), and could not be adequately summarized in three pages. For instance, the argument "the order in no way either creates or *promotes* the through transportation of

freight by rail and water" (Br. 21), and "Their (the barge lines) boats or barges appear to be of that 'tramp' class mentioned in the concurring opinion of Mr. Commissioner Eastman" (Br. 29), appears to run counter to evidence which counsel for New York Central do not include in their summary. Part of the foundation of New York Central's case appears to be that there are no interstate water carriers to move the traffic, and if there were there is no interstate traffic to move. The heavy volume of tonnage and the manner in which it is handled would strongly indicate (R. 26) that the craft on the canal (R. 24, 124) stood higher than the "tramp" class.

Witness Gilbert (for State):

"The interstate commerce is overwhelmingly in the majority; it might be approximated at 75% interstate and 25% intrastate." (R. 60.)

Witness Dinan, U. S. R. R. A. (for New York Central):

"The canal is a competitor of the New York Central. I would say it is a competitor, or at least it will be some day, practically across the entire State from Buffalo to Troy." (R. 109.)

Witness Croly, U. S. R. R. A. (for New York Central):

"If we delivered it to the dock at Buffalo, say, from the Larkin plant, we would just get the haul across the City." (R. 114.)

Witness Croly, U. S. R. R. A. (for New York Central):

"I think that connection would deprive us of a considerable traffic which we are now carrying." (R. 114.)

Witness Croly, U. S. R. R. A. (for New York Central):

"A good deal coming from the east will come into Buffalo to be unloaded there at the terminal and then to be put in our freight cars and switched around the City of Buffalo for use in Buffalo—to our detriment * * *. With canal rates as low as they are compared with rail rates, if a shipper is located where they can get additional facilities by the use of the canal without charge, it would certainly be our loss. If you followed that system, a considerable business is sure to develop there. If you could relieve the shipper by this, I should imagine that considerable business is going to develop at your terminal by the use of our shifting arrangement, but we would lose more than we can afford to at the present time. That is my carefully considered opinion." * * * (R. 115.)

Witness Croly, U. S. R. R. A. (for New York Central):

"Q. To take it to the canal terminal in the manner you prescribe by draying would subject them to additional expense?

"A. Why are you so anxious to save them expense and not care so much about us?

"Q. I am not asking that.

"A. That is just what it means. What you give to them you take away from us.

That is the only objection that we have."
(R. 117.)

III

That the Erie Basin Terminal constitutes the dock of the Barge canal boats is not denied. We thus have the water lines, the rail carrier, and the dock. The statute is fulfilled. To take the case out of the statute merely because the State of New York owns the dock and the canal and independent parties own and operate the boats is the problem of New York Central. The dock is not a private dock. It long has been and now is a facility of transportation; it never was anything else. The argument that the order of the Commission must fall because *two* carriers, one rail and one water, engaged, *at the time*, in interstate commerce, were not before the Commission, does not meet the situation. They say "that both a common carrier by rail and a common carrier by water" should be before the Commission "and subject to its jurisdiction" (Br. 19). The District Court said the words "paid to or by either carrier" necessarily imply and plainly mean "that there shall be before the Commission, and both subject to its jurisdiction, *two carriers*." (R. 133.) The District Court, after emphasizing the State of New York was not a common carrier, "common or otherwise," and that the intervention of the Barge Canal lines was almost farcical, held there was no common carrier on the water side of the dock, and, therefore, the Commission was

without jurisdiction. Such a narrow view failed adequately to consider the facts and circumstances or to give effect to the statute.

1. New York Central put the State of New York out of her own courts on the ground that the entire subject matter belonged to the field of interstate commerce. (Gov. Main Brief, 20, 33.)

2. The statute defines "carrier," "railroad" and "transportation," in an unbroken paragraph.

The term "common carrier" as used in this act shall include * * * all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, *and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any*

contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. (Ch. 91, 41 Stat. 474.)

3. The performance of the service by New York Central instantly brings the Terminal within the terms of the statute. *People ex rel. New York Central v. Public Service Commission*, 198 App. Div. 436; *United States v. Union Stock Yard*, 226 U. S. 286, 303, in which it was held that a concern which conducted "the customary stockyard operations" was subject to the act; and *Stafford v. Wallace*, 258 U. S. 495, 516, "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another."

IV

The suggestion is made in the brief of opposing counsel (Br. 37) that the counsel for the Government did not copy the proviso of paragraph (13), "its omission being represented by * * * at the end of clause (c)." The proviso appears on page 47 of the Government's main brief and relates solely to the *construction* required by the Commission. The question of the *construction* of these tracks and who shall pay therefor is not in this case. Service over these tracks is what the Commission's order directs. Nor is there any question involved

of compensation. If the order directing the New York Central to *render* the service is sustained, it may be presumed the Company will publish a tariff in compliance therewith. It will be time enough then to determine the reasonableness or unreasonableness of the arrangement and the compensation.

In *Baltimore & Carolina Steamship Company v. Atlantic Coast Line*, 49 I. C. C. R. 176, 180, the Commission said:

Here there is already a physical connection across an existing dock between the vessel which may berth at the dock of the rail carrier and the tracks of that carrier and all that is needed is the establishment of proportional rates.

That is precisely the situation here. All that the Commission's order requires is service which the rail carrier refuses to perform.

In *Charleston & Norfolk Steamship Company v. Chesapeake & Ohio*, 40 I. C. C. R. 382, 386, the Commission said:

In the case presented by this record *there is no vessel to move traffic, no terminal to handle it*, and nothing to guide us to any conclusion as to what the terms and conditions with respect to the rates should be. (*Italics ours.*)

In *Terminal Regulations at Boston*, 38 I. C. C. 643, 646, 648, 649, the directors of the port of Boston by an expenditure of about \$3,650,000 constructed the pier known as Commonwealth Pier.

"The ultimate purpose of the State was so to improve the terminal facilities and operations at Boston as to attract vessels and trade to that port in competition with other Atlantic ports. * * * All parties admit the superiority of Commonwealth Pier, which is characterized by defendant's counsel as 'perhaps the most splendid pier in the world.' " The Boston & Maine was prohibited from discriminating in favor of the Commonwealth Pier as against other piers in Boston.

In re Wharfage Facilities at Pensacola, 27 I. C. C. 252, 256, 260, physical connection existed between the rails of the railroad and the dock of the steamship company. It was held that the wharfage facilities were embraced within the statute and that the railroad company could not discriminate in making deliveries to one steamship and not to the other.

Opposing counsel cite Chapter 746, Laws of 1911, State of New York, to the effect that "the Barge Canal Terminals shall include all tracks upon the terminals, and that the terminals shall be operated and forever remain under the management and control of the State." (Br. 33, 34.) This argument was also emphasized by the District Court, but is utterly unsound in the light of *State of New York v. United States*, 257 U. S. 591, in which it was held that the State charter contract which bound the New York Central not to charge more than two cents a mile for passenger carriage between Albany and Buffalo could not prevail against

the power of Congress to regulate commerce. That ruling was reaffirmed in *Village of Hubbard v. United States*, 266 U. S. 474, 477 (see footnote). That the State of New York may not mold into the Interstate Commerce Act as limitations its laws relating to the Erie Basin Terminal is likewise settled in *Georgia v. Chattanooga*, 264 U. S. 472, 480, 481. When the State of New York submits to the Interstate Commerce Act its standing is not above that of the New York Central; nor has the State ever claimed otherwise.

V

As approximately 75% of the traffic on the canal is interstate, the interchange during 1922 by canal carriers of about 1,106,000 tons of freight at Buffalo with the lake carriers is ample proof, if such proof is needed, that these canal carriers are now engaged in interstate commerce. The statutory requirement "When property may be or is transported" is fulfilled. The evidence already referred to shows that the traffic will move over the Terminal whenever the New York Central will render the service for which the order provides.

The argument that each and every water line carrier operating in the Barge Canal and which may offer to interchange traffic with the New York Central at the dock should be made parties to the proceeding before the Commission has jurisdiction to act has been rejected.

In *New England Divisions Case*, 261 U. S. 184, 201, 202, this Court said:

The argument is, that if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the Act, in the practice of carriers, or in reason. The duty imposed upon the Commission does not extend beyond the need for its action. If the real controversy is merely how much of the joint rate shall go to carriers east of Hudson River and how much to carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves. It is obviously of no interest to the western carriers how those of New England decide to apportion their shares; nor is it of interest to the eastern carriers how those west of the Hudson divide the share apportioned to that territory. If on these matters the carriers interested can reach an agreement and no public interest is prejudiced, clearly, there is no occasion for the Commission to act.

VI

The argument that the order of the Commission "constitutes a requirement that the railroad make an extension of its line" (Br. 38) is met by *Texas &*

Pacific Railway v. Gulf, etc., Ry., 270 U. S. 266, in which the differences between extensions and industrial tracks are clearly drawn. The tracks upon which to spot cars for loading in the Terminal are no more an extension of the line than any other spur or switch track to an industry or siding for loading on the line of the New York Central, or the tracks on any other dock or pier at any port where freight is interchanged between rail and water lines. If the switch tracks do constitute an extension, the Commission has found that the service will be in the public interest. The Commission said (R. 29):

All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the Terminal tracks the operating service necessary to an interchange of traffic at the Terminal. * * * (R. 29.) We find it to be in the public interest that defendant should perform the transportation and operating services in accordance with the prayer of the complaint. (R. 30.)

Opposing counsel cite *New York Central v. General Electric Company*, 219 N. Y. 227. There the controversy was between the carrier and one of its shippers, the latter claiming an allowance for intra-plant switching movements which it performed. The lack of similarity between the two cases may be illustrated by the lack of similarity between the

General Electric Company plant and the operations thereof and the Erie Basin Terminal and the operations thereof.

VII

The judgment should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER 25, 1926.

○

Office Executive Clerk, U. S.

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U. S. DEPARTMENT OF JUSTICE

RECEIVED

In Matter of _____

John J. [Name] vs. [Name]

Complaint

The [Name] of [Name] are [Name]
[Name] [Name] [Name]

For [Name] [Name] [Name]

[Name] [Name] [Name]

[Name] [Name] [Name]

[Name] [Name]

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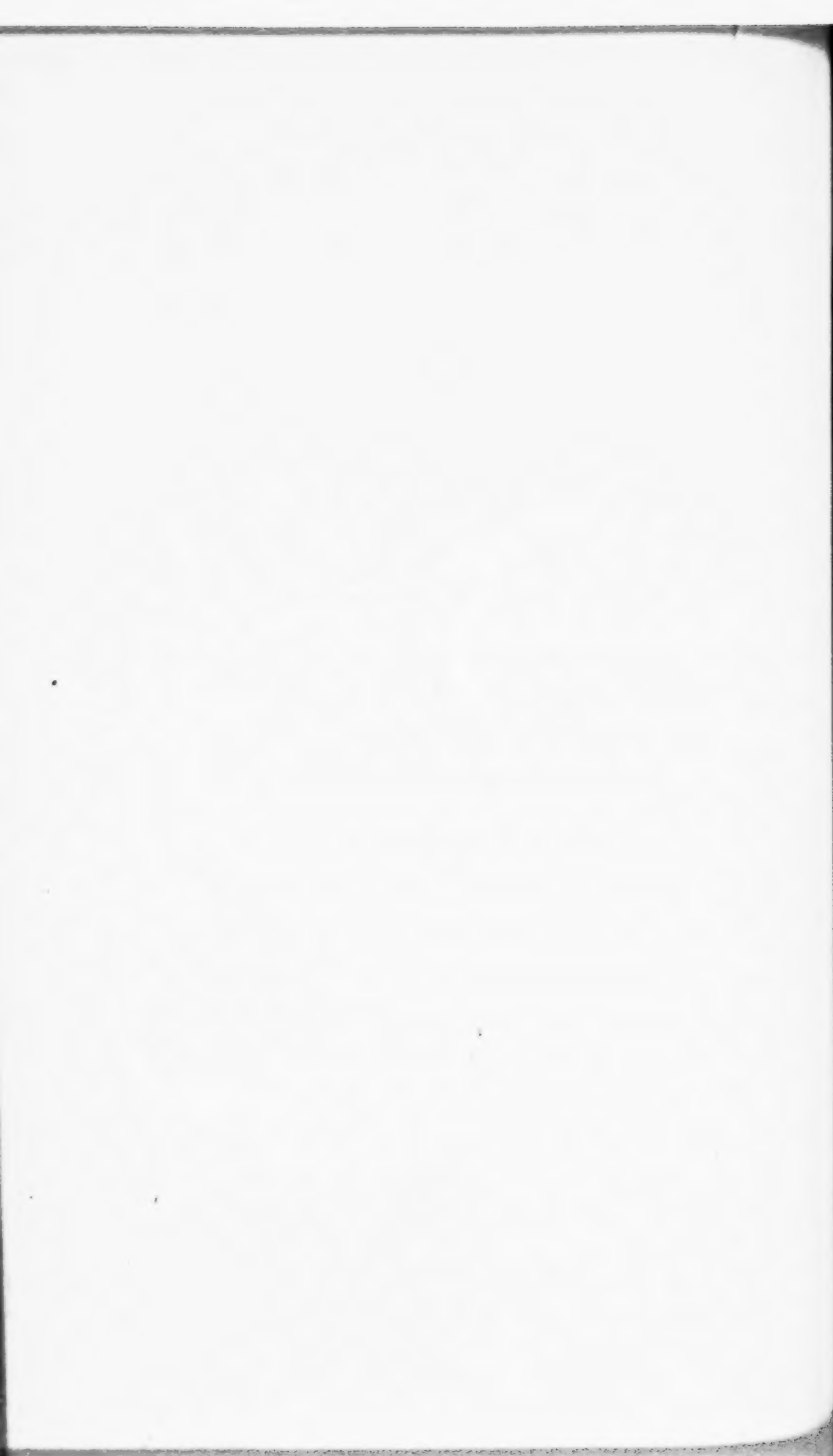
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In the Supreme Court of the United States

OCTOBER TERM, 1926

In Equity, No. 284

THE UNITED STATES OF AMERICA AND INTERSTATE
Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
appellee.

BRIEF FOR INTERSTATE COMMERCE COMMISSION

STATEMENT

The opinion in this case of Circuit Judge Hough, concurred in by District Judge Knox, 13 F. (2d) 200, and the dissenting opinion of District Judge Cooper, 13 F. (2d) 203, will be found on pages 127 to 137, inclusive, of the record.

This is an appeal from a final decree of the District Court of the United States for the Northern District of New York, annulling and setting aside an order of the Interstate Commerce Commission dated December 9, 1924, the body of which reads:

This case being at issue upon complaint and answer on file, and having been duly

heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the city of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty,

going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom.

And it is further ordered, That this order shall continue in force and effect until the further order of the commission. (Rec. 53-54.)

The order is directed against the appellee herein and was made pursuant to a complaint filed in the office of the Commission on March 22, 1923, by the State of New York and Edward S. Walsh, Superintendent of Public Works of that State. The prayer of said complaint is in part as follows:

1. That the New York Central Railroad Company provide a transportation service between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located on its tracks, in the City of Buffalo, N. Y., between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located on its tracks at any other point within the State of New York and between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located at any other point in the State of New York, on the tracks of any other railroad company, with which the New York Central Railroad Company can interchange traffic.

2. That such transportation service shall include the furnishing of necessary rolling stock by the New York Central Railroad Company, for all traffic moving from the Erie Basin Barge Canal public terminal and

from all shippers located on its tracks in the City of Buffalo or any other point on its tracks within the State of New York to the Erie Basin Barge Canal public terminal, the operation by the New York Central Railroad Company upon the railroad tracks within such Erie Basin Barge Canal public terminal by such railroad's own motive power and servants, all rolling stock going to or coming from said Erie Basin Barge Canal public terminal; and the spotting, placing and removing of rolling stock therein. (Rec. 18-19.)

At the first of the two hearings had in the proceeding before the Commission a joint petition of intervention was presented by the Rochester Terminal & Canal Corporation and the Interwaterways Line, Incorporated, common carriers by water operating canal boats, tugs, and other transportation equipment upon the barge canal, and, over the objection of appellee, the examiner in charge of the hearing permitted the petition to be filed. This was followed by a motion by counsel for complainants that the complaint be so amended as to make the interveners, and also an industrial concern included in the caption but not in the text of the petition, additional parties complainant, and that the prayer be so amended as to embrace an interchange of all traffic, interstate and intrastate, that can possibly reach the Erie Basin terminal over appellee's line. Over appellee's further objection

the examiner granted the motion and treated the complaint as so amended. (Rec. 55-56.)

Pertinent provisions of law are paragraph (13) of section 6 and paragraphs (10) and (21) of section 1, of the Interstate Commerce Act, which read as follows:

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and con-

ditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign

country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neg-

lects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

The assignments of error are eleven in number, but may, we think, be summarized as follows:

The District Court erred in holding that the order of December 9, 1924, is invalid: (1) Because it was made solely on the demand and at the suit of the State of New York, and, (2) because the Commission did not have before it two carriers subject to its jurisdiction and prescribe the sum of money to be paid to or by either carrier in connection with the operation covered by the order. (Rec. 140-141.)

ARGUMENT

I

THE ORDER OF DECEMBER 9, 1924, WAS NOT MADE BY THE COMMISSION SOLELY ON THE DEMAND AND AT THE SUIT OF THE STATE OF NEW YORK

In holding that the order was made by the Commission solely on the demand and at the suit of the State of New York, the lower court, among other things, said:

It is here essential to state that I regard the order complained of as having been made solely on the demand and at the suit of the State of New York. The intervention (so

called) of the two private corporations above named was almost farcical. Both of them averred (in their application for intervention) that they were common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. On the contrary the president of one of them deposed that his concern was "not in the interstate carrying business," and the manager of the other stated on oath that his sole interest in this proceeding was that he sometimes did not get "cast-bound business (from Buffalo) because there was no service from the terminal to the industries located in the Buffalo switching district." In other words he sometimes failed to get some intrastate business. The substance of the matter is that no common carrier engaged or seeking to engage in interstate business asked the Commission to do what it did. (Rec. 130-131.)

This view, however, does not appear to us to be justified by the record. In paragraph VII of appellee's petition herein it is admitted that at the first of the two hearings had in the proceeding before the Commission two carriers by water, upon application, were permitted to and did intervene and become parties complainant. (Rec. 5-6.) And pertinent language included in the Commission's report is as follows:

A preliminary question should be noticed. Defendant filed an answer in which, among

other things, it challenged the sufficiency of the complaint upon the grounds that neither complainant is a common carrier by water or by rail, and that no such carrier by water as is necessary to an exercise of the jurisdiction invoked had been made or had become a party to the proceeding. At the first of the two hearings had in the case the challenge was renewed, whereupon a joint petition in intervention in behalf of the Rochester Terminal & Canal Corporation and the Interwaterways Line, Incorporated, common carriers by water operating canal boats, tugs, and other transportation equipment upon the barge canal, was tendered. Over defendant's objection, the examiner permitted the petition to be filed. This was followed by a motion by counsel for complainants that the complaint be amended to make the interveners, and also an industrial concern included in the caption but not in the text of the petition, additional parties complainant; and that the prayer be amended to embrace an interchange of all traffic, interstate and intrastate, that can possibly reach the Erie Basin terminal over defendant's line. Over defendant's further objection the examiner granted the motion, and treated the complaint as so amended. The hearing thereupon proceeded.

Defendant's objections were upon the ground that the effect of the intervention and the amendment was to enlarge the issues, to meet which the time prescribed by our Rules of Practice had not been accorded

defendant for preparation of its defense. The intervening petition contains no allegations respecting the merits, but defendant contends that, because of the alleged jurisdictional defect of parties, the complaint presented no justiciable issue at all when filed, and that the intervention or amendment, if allowable, presented for the first time a cognizable cause of action. Therefore, it is contended, defendant was called upon to meet a new issue, in contravention of its rights. On brief, the further contention is made that, inasmuch as the complaint thus set up no cause of action, there was pending before us no proceeding in which an intervention could be had; but it is admitted that if the intervention or amendment was properly allowed it can not now be contended that defendant has not had opportunity to meet the issues thus presented.

As above intimated, and because of the questioned action of the examiner, we assigned the case for further hearing, with an interval of time considerably in excess of that provided by our Rules of Practice. Complainants, interveners, and defendant were represented at the further hearing, but adduced no additional evidence. Counsel for defendant merely renewed a motion made at the prior hearing that none of the evidence thus far taken be considered in behalf of the intervening parties, which motion counsel for complainants resisted.

Whether the additional parties be regarded as interveners or as complainants by

amendment (for convenience, they will be treated as interveners), and assuming for the moment that they were necessary parties, their inclusion in support of the complaint has, in the light of the further hearing had, denied to defendant the benefit of no meritorious defense or adequate time or opportunity to prepare and present it. Defendant has also at all times and in all instances had full opportunity to cross-examine the opposing witnesses. Incidentally, a large part of the evidence, including all that has been submitted for defendant, is embraced in a transcript of the proceedings before the State commission, introduced by complainants at the first hearing without objection by defendant. Even granting that the examiner erred at the time, the ultimate result has been the same as if the intervention or an appropriate amendment had been filed with and allowed by us seasonably before the first hearing. It is not disputed that defendant has had its day in court, and we think the objection not well taken. (Rec. 22-23.)

Also, upon this point, Judge Cooper in his dissenting opinion said:

Two water carriers intervened in the proceeding, viz: Rochester Terminal and Canal Corporation and Interwaterways Line, Inc., by a petition which appears in the record.

The Commission held that their intervening petition was regular and in accordance with its rules. The Commission was authorized to make its own rules and was compe-

tent to determine that the intervention was in accordance with such rules. The Court should be concluded by the Commission's determination. For this Court to hold otherwise would almost usurp the power of the Commission to make and interpret its own rules.

The intervenors described themselves as common carriers in their intervening petition and the Commission so found. The fact that they did not file a schedule of rates, or tariff of charges, with the Commission is not serious. A plea of nonfiling would not be available as a defense in an action against them. Assuming that the Court is not bound by the determination of the Commission as to the character of these water carriers, the evidence is sufficient to show that they are common carriers transporting freight moving in interstate transit. (Rec. 134-135.)

Descriptions of the equipment and operations of said interveners, contained in the record, are as follows:

Interwaterways Line, Inc.—Operates 5 steel motor ships, of 1,500 tons capacity each, in a bulk-cargo service between New York and Buffalo.

Rochester Terminal & Canal Corporation.—Operates 10 450-ton wooden barges, with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New

York and Rochester handled upon prior arrangement. (Rec. 124-125.)

We think the matters referred to above show clearly that the order of December 9, 1924, was not made by the Commission solely upon the demand and at the suit of the State of New York.

II

THE LOWER COURT ERRED IN HOLDING THAT THE ORDER OF DECEMBER 9, 1924, IS INVALID FOR THE REASON THAT THE COMMISSION DID NOT HAVE BEFORE IT TWO CARRIERS SUBJECT TO ITS JURISDICTION AND PRESCRIBE THE SUM OF MONEY TO BE PAID TO OR BY EITHER CARRIER IN CONNECTION WITH THE OPERATION COVERED BY THE ORDER

Appellee admits, in paragraph I of its petition (Rec. 2), that it is a common carrier and subject to the provisions of the Interstate Commerce Act, and, since the order is directed only against appellee and simply requires it to furnish a transportation service upon the Erie Basin barge-canal public terminal and between the terminal and other points, for the purpose of facilitating the transportation of traffic from and to the terminal to and from points on the lines of appellee and on the lines of appellee's connections, it is difficult to understand why any common carrier other than appellee was a necessary party to the proceeding before the Commission upon which the order is based.

We have seen that the Commission may exercise the authority conferred upon it by paragraph (13) of section 6 "When property may be or is transported from point to point in the United States by

rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State," and that such a condition existed at the time the order was made is shown by evidence contained in the record and referred to in the Commission's report as follows:

During 1922 the canal carriers interchanged about 1,106,000 tons of freight at Buffalo with the lake carriers, of which about 550,000 tons consisted of ex-lake grain. In addition, they brought about 38,000 tons of local traffic into Buffalo and took about the same amount outbound. Approximately 75 per cent of the traffic on the canal is interstate. Traffic officials of five of the principal industries at Buffalo testified in behalf of complainants. Two of them have their own docks, but desire to make less-than-barge shipments via the Erie Basin terminal. Of the remainder, two have water connections with the terminal, but have no docks at their plants. The traffic manager of the Buffalo Chamber of Commerce estimates that the volume of traffic that would move over the connection, if the proposed service were established, would range from 100,000 to 125,000 tons per year. One of the principal shippers estimates that its traffic alone would amount to 20,000 tons annually. (Rec. 26.)

In holding that the order is invalid for the reason, among others, that the Commission did not

have before it two carriers subject to its jurisdiction, the lower court said:

Now let it be admitted that the words "may be" (*supra*) authorized the Commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the *operation* of tracks a determination shall be made of what shall be "paid to or by *either carrier*," such a statute necessarily implies and plainly means that there shall be before the Commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the Commission was the State of New York. (Rec. 133.)

The meaning of this language of the lower court does not appear to us to be entirely clear; but, taken in connection with language of the court quoted under point I of this brief, we understand the meaning to be that neither of the common carriers by water which intervened in the proceeding before the Commission was then a common carrier within the meaning of section 1 of the Interstate Commerce Act; and that such a construction, as a practical matter, would eliminate the words "in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten," contained in section 13 of the Act, and that the construction is otherwise

unreasonable, are shown in the concurring opinion of the present Chairman of the Commission, Commissioner Eastman, from which we quote as follows:

One of the chief points made in the dissenting opinion is that the words "a common carrier or carriers," in the above-quoted paragraph, do not have their ordinary meaning but must be interpreted in the light of the provisions of section 1 of the interstate commerce act. By such reasoning, which is fully set forth and need not here be repeated, the conclusion is reached that we have no jurisdiction under paragraph (13) of section 6, unless the carrier by water which may or does, in connection with a rail carrier, transport property in interstate commerce "from point to point in the United States * * * through the Panama Canal or otherwise," is under common control or management with some carrier by rail, or has entered into an arrangement with some rail carrier for the continuous carriage or shipment of passengers or property.

* * * * *

Under the reasoning of the dissenting opinion, the powers conferred by this paragraph and its lettered subdivisions could be exercised only—

1. Where the water line is under common control or management with some rail carrier, in which case there would seldom, if ever, be need for the exercise of such powers; or—

2. Where the water line has already made an arrangement with some rail carrier for continuous carriage or shipment, or, in other words, has already been able to accomplish, in substantial part at least, the object which paragraph (13) was designed to further.

Thus, the conditions precedent to the exercise of the powers conferred would rarely exist. It is evident that this construction of the law would reduce it almost to a nullity and certainly to an absurdity. * * *

It is true that paragraph (3) of section 1 of the interstate commerce act provides that the term "common carrier" as used in the act "shall include," among others, "all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire." It is also true that the reference to transportation "as aforesaid" relates back to the part of paragraph (1) of the same section which states that—

the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

But paragraph (13) of section 6 was injected into the act to regulate commerce by the Panama Canal act after the former was amended in 1910, and with the provision

that the jurisdiction thus conferred should be "in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten." Moreover, throughout the interstate commerce act, when reference is made to a common carrier which comes within the definition of section 1 and is subject to the general provisions of the act, it is customary to use the words "common carrier subject to the provisions of this Act," or words of similar effect, unless the context makes their use unnecessary. In that part of paragraph (13) of section 6 which is in question, such language is not used, but the reference is merely to "a common carrier or carriers"; nor does the context imply such restriction. It is a reasonable inference that it was not the intent to confine or restrict the ordinary meaning of these words within the limitations of section 1.

This conclusion is strengthened by the fact that there are other provisions of the act where the words "common carrier" are plainly used in their ordinary meaning, unrestricted by section 1. Thus, in section 25, added February 28, 1920, certain duties are imposed upon "every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States." In paragraph (9) of section 5, railroad companies are prohibited from having any interest whatsoever "in any common carrier by water operated through the Panama Canal or elsewhere." And in subdi-

vision (d) of paragraph 13 of section 6, it is provided that if a rail carrier enters into an arrangement for the handling of through business with "any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise," we may require it to enter into similar arrangements with other similar steamship lines. A further illustration will be found in the provisions of paragraph (24) of section 1, noted in the dissenting opinion. Section 15a contains its own special definition of the word "carrier," as does section 20a, the latter definition including "any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." Until the amendment of 1920, the definition in section 1 was merely this: "The term 'common carrier' as used in this Act shall include express companies and sleeping car companies." It is evident that this definition was not intended to be all inclusive; nor is the definition in its present form. In the case of water transportation there is particular reason for employing the words "common carrier" in their ordinary meaning, in order to distinguish lines so operated from the many cargo vessels, such as tramp steamers and the like, which are not operated as common carriers. The conclusion that the words are so used in paragraph (13) of section 6 is further strengthened by the fact that any other construction would result, as I have shown, in reducing the provisions of that paragraph and its let-

tered subdivisions to a virtual nullity. (Rec. 31-33.)

The holding of the lower court that, in a case of this kind, the Commission must have before it two carriers subject to its jurisdiction is based entirely, as above shown, upon its conclusion that the Commission may not direct the operation of the terminal tracks unless at the same time it determines the sum of money to be paid to or by either carrier in connection with such operation, but this does not appear to us to be a proper construction of subdivision (a) of paragraph (13) of section 6 above set forth. By this subdivision the Commission is authorized: (1) To require a physical connection between the tracks of the rail carrier and the tracks leading to the dock used by the water carrier; (2) to determine and prescribe the terms and conditions upon which the connecting tracks shall be operated, and, (3) to determine the sum of money to be paid to or by either carrier in connection with such operation.

The order of the Commission does not contain any requirement in connection with the making of a physical connection, for the reason that such connection already exists and was made pursuant to a contract entered into in May, 1919, by and between the State of New York on the one hand and the Director General of Railroads, as operator of appellee's railroad, on the other hand (Rec. 27), and, while the Commission in its order prescribed

the terms and conditions under which the terminal tracks are to be operated to the extent of providing that the transportation services involved shall be performed by appellee through its own employes and with equipment furnished by appellee, the Commission did not determine or prescribe the sum of money to be paid to or by either carrier in connection with the operation, and there is no language in such subdivision which requires it to do so. In this connection the pertinent language of the subdivision is:

* * * and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier.

This language simply confers upon the Commission authority to determine and prescribe the sum of money to be paid to or by either carrier, but where, as here, the terminal tracks are to be operated entirely by the rail carrier and compensation for such operation is to be provided for in transportation rates to be prescribed by that carrier it is not necessary for the Commission to determine or prescribe the sum of money to be paid to or by either carrier.

In speaking of the authority conferred upon the Commission by the subdivision mentioned, in *People v. Public Service Commission*, 191 N. Y. S. 636, the Supreme Court of New York, Appellate Division, Third Department, said:

This act of Congress not only gives to the Interstate Commerce Commission power to establish physical connection between the lines of the rail carrier and the dock, but also to direct the rail carrier and the water carrier singly or jointly "to construct and connect with the lines of the rail carrier a track or tracks to the dock"; also full authority to determine and prescribe the terms and conditions upon which these tracks shall be operated and by whom, * * *. (Id. 639-640.)

That the Commission might have prescribed proportional rates to be exacted by appellee for the interstate transportation from and to the terminal docks will appear from an examination of subdivision (c) of paragraph (13), but such prescription is not required as an initial matter. If petitioner establishes rates for such transportation which hereafter are complained of as unreasonable or otherwise unlawful the Commission is authorized by sections 13 and 15 of the Act, after hearing upon complaint, or upon its own initiative without complaint, to require such changes in the rates as may be necessary to render them lawful.

By requiring appellee to transport both interstate and intrastate traffic from and to the terminal dock the Commission did not render the order invalid for the reason that such a requirement is not a regulation of intrastate commerce. The contention made by appellee in this connection appears to us to be the same in principle as a contention

which was advanced in *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194, wherein was involved an order of the Commission requiring a common carrier engaged in interstate commerce to file in the Commission's office a report of interstate business and also of other business done by the carrier. In holding the contention to be without merit, this court, among other things, said:

* * * It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. * * *. (Id. 211.)

To the same effect see *Wisconsin, Minnesota and Pacific Railroad v. Jacobson*, 179 U. S. 287, wherein, in holding to be valid an order of the Railroad Commission of Minnesota requiring two carriers by railroad to make track connections with each other, this court said:

* * * To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective

lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution. (Id. 295.)

We think the matters to which we have referred establish that in making the order of December 9, 1924, the Commission did not exceed the authority conferred upon it by paragraph (13) of section 6, but it is not necessary to rely entirely upon that paragraph, because the authority exercised by the Commission in requiring appellee to furnish the transportation services covered by said order is specifically conferred upon the Commission by paragraphs (10) and (21) of section 1 hereinbefore set forth. We have seen that the car service the Commission is authorized by paragraph (21) to require a carrier by railroad to furnish, as defined in paragraph (10), includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, and that paragraph (21) also authorizes the Commission to require a carrier by railroad to extend its line or lines.

It is true that the extension may not be required unless the Commission " finds, as to such extension, that it is reasonably required in the interest of

public convenience and necessity," but such a finding is contained in the Commission's report, from which we quote as follows:

We find it to be in the public interest that defendant should perform the transportation and operating services in accordance with the prayer of the complaint, as amended, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal; and an order to that end will be entered. (Rec. 30.)

Appellee calls attention to the fact that the complainants in the proceeding before the Commission asked for relief under paragraph (13) of section 6, but, in so far as complainants are concerned, the relief asked for, and not complainants' conclusion as to the provisions of law under which the relief may be granted, is the matter of importance. That in making the order the Commission did not consider itself confined to the authority conferred upon it by paragraph (13) of section 6 is shown by the Commission's report, from which we quote as follows:

* * * All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the terminal tracks the operating service necessary to an interchange of traffic at the terminal. Under the terms of the statute our power to require it is distinct and complete. Under another section of the act we have power to

require a railroad to extend its line, and for obvious reasons this includes authority to require the carrier to operate the extension.

* * *. (Rec. 29-30.)

As a matter of substance, the order under consideration here is the same as the order the validity of which was involved in *People v. Public Service Commission, supra*, and concerning the latter order the Supreme Court of New York, among other things, said:

The order requires the relator to provide transportation service between this Barge Canal terminal, on the one hand, and shippers located along its tracks in the city of Buffalo, and shippers located along its tracks at any other point in the state of New York, and shippers located at any other point in the state of New York on the tracks of any other railroad company, with which the relator can interchange traffic, on the other hand. It provides that the relator shall furnish the necessary rolling stock for all traffic at this terminal and operate the same (including the spotting, placing, and removing of cars) by its own motive power and servants; that the relator shall "file tariffs with the Commission for all service into and out of said terminal, and over its connecting lines."

The connection having been made between the terminal tracks and the relator's line, the relator is willing to place cars on and take cars from a proper interchange track, off its

own lands, for this terminal, but it refuses to furnish engines and rolling stock and to operate them through the terminal; it refuses to spot cars on the docks and to do switching at the terminal beyond the proposed interchange track. Thus the issue here is raised.

The relator makes two principal objections: (1) That Public Service Commissions Law (Consol. Laws, c. 48) Section 49, subd. 3, par. (a), amended by Laws 1917, c. 805, as amended by chapter 541 of the Laws of 1920, which took effect May 5, 1920, is unconstitutional and beyond the power of the Legislature to enact; and (2) that the federal Transportation Act of 1920 authorizes the Interstate Commerce Commission to make regulations for interchange of traffic between water carriers and rail carriers and excludes the Public Service Commission of the state from power or authority to act in this respect.

The order made by the Public Service Commission is entirely within the provisions of the aforesaid section of the Public Service Commissions Law. The state legislature had power, "under its reserved control over corporations," to enact the statute requiring the relator, its creature, to assume the burden imposed. * * *. (Id. 638.)

As shown in the Commission's report (Rec. 23) the decree of said Supreme Court was affirmed, without opinion, by the Court of Appeals of the State of New York (236 N. Y. 606), and, since the

carrier referred to as the relator in the New York case is the appellee here, it is difficult to understand how consistently it can be contended, as is contended by appellee in paragraph XXV of its petition (Rec. 13), that the Commission's order of December 9, 1924, is in conflict with Chapter 746 of the Laws of 1911, or with any other law, of the State of New York.

But, while the order of the New York Commission and the statute law pursuant to which the order was made were held to be constitutional by the courts, including the highest court, of that State, the opinion was expressed that the jurisdiction the State Commission otherwise might have exercised had been vested exclusively in the Interstate Commerce Commission by section ⁶(13) of the Interstate Commerce Act. In this connection the court said:

Congress having exercised its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the state, and the power of the state to regulate such connections and the operation of them ceases to exist; when the federal government has exercised its power, it covers the whole field, and even if, in certain details, the state act differs from the federal act, such state act is still inoperative. (Id. 640.)

In describing what it stated to be the principal purpose sought to be accomplished by the enactment of section ⁴(13), language used by the lower court was as follows:

It is well known that this section took its present shape principally to facilitate and advantage traffic through the Panama Canal. But it is so drawn as to be of much wider import. * * *. (Rec. 132.)

That the wider import referred to was intended by Congress is indicated by the report of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated March 16, 1912, printed as Report No. 423, Sixty-second Congress, second session, from which we quote as follows:

This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal, the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to the people living many hundreds of miles inland from both coasts. (Rec. 31-Note.)

And such intention is further indicated by section 500 of the Transportation Act, 1920, the first paragraph of which reads:

It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

That the tracks on the Erie Basin Barge Canal public terminal, although owned by the State of New York, are available for use by appellee is shown by the report of the Commission from which we quote as follows:

* * * In the instant case the docks and other terminal facilities for interchange at Buffalo are the property of the State of New York, but they are fully available to all canal craft and appear to be adequate for the purpose contemplated by the complainant.

In the light of the State's attitude in the case and its manifested desire to promote the greatest practicable use of the canal, it would follow that, if the requisite construction and track connection had not already been accomplished, the first of the powers granted us under the section hereinbefore outlined could have been exercised upon an invocation of that relief, the concurrence of the State being assured, if other essential elements were established of record. By the

same token, since the complete terminal facilities are unreservedly tendered for the necessary use by defendant and such canal lines as may desire to participate in the traffic that would be affected, it is competent for us in an appropriate case to enter an order on the merits which, incidentally or directly, would preclude a severance of the existing connection pursuant to the contract provision before mentioned. (Rec. 28.)

And that, as a practical matter, the terminal tracks must be operated by appellee, if they are operated at all, is shown in the dissenting opinion of Judge Cooper, who, in this connection, said:

True, the terminal dock and the tracks thereon, including the connecting track, belong to the State of New York, but the State of New York is not a common carrier (*Peo. ex rel. N. Y. Central vs. Pub. Ser. Comm. supra*), and it has no equipment for the operations specified in the order of the Interstate Commerce Commission.

If the terminals and tracks thereon are part of the canal system of the State, then the State, if it could render such transportation service, would be required to render the service gratis, for Section 9 of Act VII of the State Constitution prohibits the imposing of "tolls"—on persons or property transported on the canals.

The Act under which the funds for the barge canal terminals and tracks thereon were authorized, the terminals and railroad

tracks constructed, and their use regulated, in substance puts these canal facilities, along with the canals of the State, under the jurisdiction of the Canal Board of the State.

Chap. 746, of the Laws of 1911, approved by referendum of the People of the State.

Water carriers are not usually equipped to operate railroad tracks. It follows, therefore, that if the connection here is to be operated at all, it must be by the petitioner railroad, which is equipped for such operation. (Rec. 135-136.)

At the hearing of oral argument in the lower court counsel contended that appellee had not been protected adequately against injury it may suffer in operating the terminal tracks if they are not maintained properly by the State of New York, and this contention was answered by Judge Cooper as follows:

The question of subjecting the railroad company to liability for damages arising from operating the tracks upon the property of the State is not a serious one in the determination of the matter now before the Court. The State maintains its canals, and no assumption can fairly be made that it will not properly maintain its canal terminals. The contract for the construction and operation of the terminal tracks in question between the State and the Director General of Railroads, while the railroads were operated by the Federal Government, expressly provided that the State should maintain the

tracks on this Terminal. This contract is probably not now in effect.

Even if the State should not properly maintain this Terminal, and the tracks should become dangerous to operate, such tracks might well be maintained by the railroad and, if not collectible from the State, the expense of such maintenance, like the expense of maintaining its own right of way, might become an important factor in the fixing of the rates to be charged for the service, and may also be apportioned between the rail and water carriers.

Moreover, the jurisdiction of the Interstate Commerce Commission is continuous and it may from time to time alter or modify the terms on which the connection shall be operated. If the State should not maintain its terminal tracks, the Interstate Commerce Commission has the power to rescind its order if the service required would, because of non-maintenance by the State, be unduly burdensome to the railroad, or to the water carriers, or to both.

No presumption may be indulged in that the railroad will not be treated fairly by the Commission. (Rec. 137.)

And, in calling attention to what he regarded as inconsistency between different contentions made on behalf of appellee, Judge Cooper further said:

The rail carrier is inconsistent in contending in this Court that there is no interstate commerce, even potential, which would pass through this Terminal and that, therefore,

the Interstate Commerce Commission had no jurisdiction to make the order in suit after prevailing in the State Courts on the ground that there was interstate commerce and that, therefore, the State Public Service Commission had no jurisdiction. (Rec. 135.)

For the reasons above set forth we insist that the decree of the lower court should be reversed and that the petition of appellee herein should be dismissed.

Respectfully submitted.

P. J. FARRELL,

For Interstate Commerce Commission,

Appellant.

SEPTEMBER, 1926.

○

FILED

OCT 21 1926

WM. B. STANSBURY
CLERK

BRIEF FOR APPELLEE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

**THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,**

APPELLANTS,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

APPELLEE.

**Appeal from the District Court of the United States
for the Northern District of New York.**

CHARLES O. PAULDING,

New York City.

ROBERT E. WHALEN,

Albany, N. Y.,

Counsel for Appellee.

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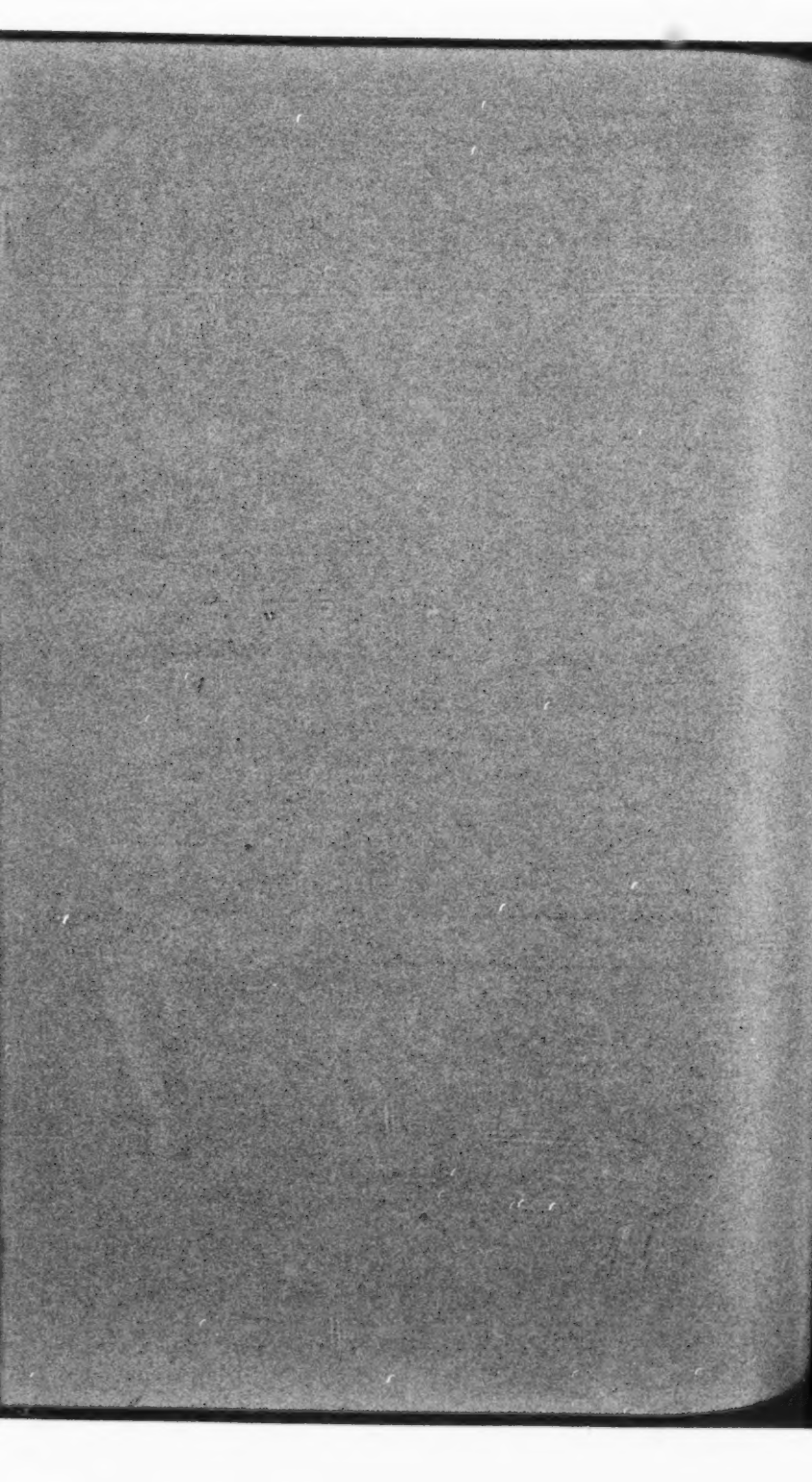


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BRIEF FOR APPELLEE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

THE UNITED STATES OF AMERICA and INTERSTATE COM-
MERCE COMMISSION,

Appellants,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellee.

Appeal under Section 238 (4), Judicial Code, as amended February 13, 1925, from a final decree of the District Court of the United States for the Northern District of New York, dated October 9, 1925. (R. 137-138.) Opinions below: 13 F. (2d.) 200; R. 127.

Appellee, The New York Central Railroad Company, in this brief called the railroad, brought this suit against the United States, under the Urgent Deficiency Appropriations Act of October 22, 1913 (38 Stat. L. 219) and Section 208, Judicial Code (R. 2), to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission, dated December 9, 1924 (R. 15, 53), in this brief termed the Order, made upon the complaint of the State of New York and its Superintendent of Public Works. (R. 17.) The statutory venue (38 Stat. L. 219) was determined

by the official residence of the State Superintendent of Public Works (R. 3; *Stoddard v. Manzella*, 207 App. Div., 519). Under Section 212, Judicial Code, the Interstate Commerce Commission intervened. (R. 49.)

The Order, made upon a "complaint for failure to render service under section 6, subdivision 13, of the Interstate Commerce Act" (R. 16), purports to require the railroad to perform a transportation service between points on its lines and points on the lines of its connections, on the one hand, *and* the Erie Basin Barge Canal Terminal, at Buffalo, N. Y., on the other, and with its locomotives, cars and employees to operate the tracks upon the terminal. (R. 7.)

In its petition to the court below the railroad contended that the Order is null and void, because granted in excess of the authority conferred upon the Commission by subdivision 13 of section 6 of the Interstate Commerce Act, in that:

(a) It is not limited to cases where "property may be or is transported from point to point in the United States by rail and water." (R. 8);

(b) It is supported by no finding by the Commission that property may be or is so transported. (R. 8-9);

(c) It was made in a proceeding wherein the Commission had before it and subject to its jurisdiction no common carrier or carriers by water which might or did engage in such transportation, whereas the statute confers authority upon the Commission to make such an order only when there are before it and subject to its jurisdiction both a common carrier or carriers by rail and a common carrier or carriers by water, which may or do engage in such transportation. (R. 9);

(d) It does not create a through route or routes for the transportation of property by common carriers by rail and water through or via the terminal, since it requires no common carrier by water to participate in any interchange of freight at the terminal, or to accept for through transportation freight which may be delivered at the terminal by the railroad. (R. 10);

(e) It does not prescribe the terms and conditions upon which the tracks connecting the railroad's lines with the dock shall be operated, nor does it determine what sum shall be paid to or by the railroad or any water carrier in the operation of such tracks. (R. 10-11);

(f) It requires the railroad to extend its lines. (R. 11-12);

(g) It requires the railroad to perform a transportation service between the terminal and points upon the lines of other connecting railroads not parties to the proceeding. (R. 12);

(h) It requires the railroad to furnish transportation with respect to intrastate traffic. (R. 12);

Such contentions were put in issue by the answers of the United States (R. 47) and of the Interstate Commerce Commission. (R. 50.)

Upon the application for an interlocutory injunction, the case was submitted, by agreement, for final hearing upon the pleadings and the record of the proceedings before the Interstate Commerce Commission; whereupon decree went for the railroad, pursuant to an opinion by Circuit Judge HUGH in which District Judge KNOX concurred; District Judge COOPER dissenting in an opinion. (R. 127-138.)

Statement of the Case.

At an expense of over \$150,000,000, the Barge Canal was constructed by the State of New York and extends across the State from Albany to Tonawanda with branches from Whitehall to Waterford, from Syracuse to Oswego and from Geneva to Montezuma. (R. 20.) The State of New York does not operate boats upon the canal, but merely provides the waterway, and is, therefore, not a common carrier. (R. 24, 97.)

The State has constructed terminals at various points along the Barge Canal and, among others, the Erie Basin Terminal, situated upon Buffalo Harbor, adjacent to Lake Erie, within the City of Buffalo. (R. 20.) It embraces about eight acres of land and comprises two covered piers, 500 and 400 feet long, respectively,

with electrically operating machinery for loading and unloading vessels. (R. 21.) Rock Street, a public street, forms the eastern boundary of the terminal property and the right-of-way of the railroad adjoins Rock Street on the opposite side. (R. 80.) More than 5,000 feet of standard gauge tracks have been constructed by the State upon the Terminal, including tracks leading to the piers and an extensive layout of storage tracks on the eastern portion of the Terminal away from the piers. (R. 21, 25.) From the tracks of the railroad on its right-of-way there has been constructed a track connection, called the interchange track, joining the tracks of the railroad with the tracks upon the piers. (R. 17, 25, 104, 107.) The distance from this track connection, which is approximately at the boundary of the railroad's right-of-way, to the piers is from 800 to 900 feet, as scaled on Exhibit 5. (R. 61.)

The railroad has consented to place cars containing freight destined to the Erie Basin Terminal upon the interchange track and to receive cars containing freight coming from the Terminal when delivered to it upon this track. (R. 26.) The State of New York, however, has demanded not only that the railroad shall deliver and receive cars at the interchange track, but that it shall transport freight to and from the docks of the Terminal and shall with its locomotives and employees perform all switching operations and other operations in the handling of freight upon the tracks within the Terminal. (R. 19.)

In 1920 the State of New York applied to the Public Service Commission of the State for and obtained an order requiring the railroad to provide a transportation service to and from the Terminal and to perform all railroad operations on the Terminal, but that order was set aside by the State courts upon the ground that Congress, in enacting Section 6, Subdivision 13, of the Interstate Commerce Act, had occupied the field of regulation of the interchange of freight between common carriers by rail and by water, and that therefore the State law was inoperative. *People ex rel. N. Y. C. R. R. Co. v. Public Service Comm.* (198 App. Div., 436; *aff'd*, 232 N. Y., 606). Certiorari to the State Courts was denied in 258 U. S., 631.

Thereupon the State of New York and its Superintendent of Public Works filed with the Interstate Commerce Commission a complaint, invoking the jurisdiction of that Commission under Section 6, Subdivision 13, of the Interstate Commerce Act, and praying for an order of the Commission thereunder, requiring the railroad to furnish a transportation service for the transportation of freight between the Terminal and points on its line and also points on the lines of its connections, and with its locomotives and employees to perform all railroad operations upon the tracks within the Terminal. (R. 17.) To such complaint the railroad filed its answer (R. 75), asserting, among other defenses, that the Commission was without jurisdiction to exercise any authority under Section 6, Subdivision 13, of the Interstate Commerce Act for the reason that no common carrier by water operating upon the canal with whom freight would be interchanged at the Terminal was made a party to the case or was subject to the jurisdiction of the Commission.

Hearings were had before an Examiner of the Interstate Commerce Commission. (R. 54.) At the first hearing the railroad moved to dismiss the complaint, upon the ground that no common carrier by water was before the Commission and that therefore the Commission was without jurisdiction. The motion was overruled. Thereupon the Deputy Attorney-General of the State of New York, representing the State, presented what he called an intervening petition, asking that two alleged common carriers by water, the Inter-Waterways Line, Inc., and the Rochester Terminal and Canal Corporation, be permitted to intervene. The Examiner allowed the intervention and also ruled, over the objection of the railroad, that these water carriers should be treated as complainants. (R. 55, 63-64, 75.)

A copy of the minutes of the testimony taken before the Public Service Commission (R. 79-126) was introduced as evidence in the proceeding before the Examiner (R. 19, 59), and in addition thereto various witnesses were called to give testimony. (R. 54-75.)

The evidence before the Interstate Commerce Commission may be summarized briefly as follows:

1. A description of the New York State Barge Canal and testimony with respect to the amounts expended for its construction. (R. 57-58.)

2. A detailed description together with blueprints and photographs of the Erie Basin Terminal, including the tracks upon the Terminal and the tracks connecting with the tracks of the railroad. (R. 61-62.)

3. Testimony of operating officials of the railroad to the effect that the tracks upon the Terminal were not so constructed as to render operation thereon with modern equipment feasible; that the curves were so severe that a modern switching engine could not go upon the Terminal without danger of derailment, and that the switching of cars upon the Terminal could only be performed with an old fashioned switching engine of short wheel base, and finally that the handling of the cars to and from tracks upon the Terminal would seriously interfere with the operations of the railroad upon its tracks adjacent thereto and particularly the movements of its passenger trains and the passenger trains of other railroads using its tracks. (R. 105, 109-112.)

4. A list (R. 124-126) of the barge lines alleged to be operating upon the canal with, however, no testimony with respect to any of them, except the two which over the railroad's objection were permitted to intervene.

The representative of the Inter-Waterways Line, Inc., one of the so-called intervenors, testified that his company had filed no tariffs either with the Interstate Commerce Commission or with the New York Public Service Commission and that it was free to raise or lower its rates as it wished; that it had never been offered any westbound freight for delivery at Buffalo, except to steamship docks and grain elevators; that its eastbound business consisted largely of shipments of grain from Buffalo which were received directly from elevators, and that it had no present plans for increasing its equipment to handle additional freight. The railroad contends that the testimony of this witness affords no basis for any conclusion that his company will or may interchange freight with the railroad at the Erie Basin Terminal or deliver or receive freight at that point. (R. 71-73.)

The representative of the Rochester Terminal and Canal Company, the other so-called intervenor, testified

that his company is not in the interstate carrying business, that it receives no business either eastbound or westbound through the port of Buffalo, and that it likewise filed no tariffs either with the Interstate Commerce Commission or with the New York Public Service Commission. (R. 74.)

No testimony other than that of these two witnesses was produced with respect to any water carrier operating on the New York State Barge Canal.

5. Testimony of representatives of industries located in Buffalo, apparently called by the State in an attempt to prove a demand on the part of the public for the service which the State sought to have the railroad perform and that there would be freight to be transported via the Erie Basin Terminal. To summarize:

The Traffic Manager of the Donner Steel Company testified that his concern had its own docks from which it shipped via the Barge Canal in full barge loads and that it would use the Erie Basin Terminal only for part barge load shipments. His further testimony that the water lines operating on the canal had refused to accept less than full barge shipments indicates, however, that the Terminal could not be used by his company in connection with such shipments. Freight from the Donner Steel Company's plant would have to move over three railroads in order to reach the Terminal. (R. 89-91.)

The Traffic Manager of Larkin Company, while he expressed a desire for the service, testified that his concern did not ship by the Barge Canal for the reason, among others, that there were not proper boats on the canal to handle the character of freight which his concern shipped and the canal is not equipped with suitable terminal facilities for the handling of this freight at the various towns to which his company's shipments moved. (R. 91-93.)

The Traffic Manager of the Rogers-Brown Iron Company testified that his concern was situated similarly to the Donner Steel Company, having its own docks. (R. 96.)

According to its Traffic Manager, the plant of the National Aniline & Chemical Company is located on Buffalo Creek, and while it has no docking facilities at the present time, it would be possible for it to provide

them. Presumably, therefore, if it has any substantial amount of freight to be moved by the Barge Canal it would be to its interest to construct a dock and the fact that it has not done so indicates that it does not intend to ship its freight in this way. (R. 94.)

The plant of the Corrugated Bar Iron Company, Inc., located at Lackawanna, N. Y., is served by the lines of the South Buffalo Railroad which has a water front connection. The representative of this concern said that if his company could ship by water its New York business would be increased from 10,000 to 20,000 tons a year. (R. 64-65.)

The foregoing witnesses were the only men directly connected with any industries at Buffalo who were called as witnesses below. The State also offered the Traffic Manager of the Buffalo Chamber of Commerce, who estimated that there would be from 100,000 to 125,000 tons of freight to move in and out of Buffalo by the Barge Canal. This statement was based upon replies which the witness said he had received from a circular letter which had been sent out by him. The Examiner ruled that the circular letter was not admissible in evidence, but the witness stated the substance of the letter. The replies which the witness said that he had received were excluded by the Examiner, but the witness expressed an opinion, based upon those replies, that there would be approximately 100,000 to 125,000 tons of freight to be handled through the Erie Basin Barge Canal Terminal if the railroad were required to perform the transportation service sought. The witness admitted that the circular letter had been sent to a great many people, that only 81 replies had been received, that there were a great many from whom no replies were received and that a great many of the replies were adverse, that is, that the parties were not interested in or did not have freight to move via the Erie Basin Terminal. (R. 70-71.)

The railroad contends that the testimony of this last witness was entirely incompetent and that certainly upon the record there is no evidence justifying a finding that any freight or at least any appreciable quantity of freight is or may be transported by rail or water via the Terminal.

Following the hearings the Examiner submitted a proposed report, containing the findings which he recommended, and excep-

tions thereto were filed. (R. 20.) Before the Interstate Commerce Commission, in brief and argument, the railroad urged that the Commission was without jurisdiction to grant the relief prayed for under Section 6, Subdivision 13, of the Interstate Commerce Act, because no common carrier by water was before the Commission and subject to its jurisdiction; and because there was no evidence upon which the Commission would be justified in finding that there was any property which might or would be transported by rail and water via the Terminal. (R. 29.)

In the Commission the prevailing opinion was delivered by Mr. Commissioner McCHORD (R. 20), with whom Mr. Commissioner EASTMAN concurred in a separate opinion (R. 30); while Mr. Chairman HALL dissented in an opinion in which Mr. Commissioner POTTER concurred. (R. 36, 46.)

On December 9th, 1924, the Commission issued its order as follows (R. 7):

"It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the City of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further Ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom."

ARGUMENT

I.

Since the Order was made solely under the provisions of Section 6, Subdivision 13, of the Interstate Commerce Act, its validity depends upon whether, in the circumstances, such provisions conferred upon the Commission power to make the Order.

Section 6, Subdivision 13, of the Interstate Commerce Act, as amended by Sections 412 and 413 of Transportation Act, 1920 (41 Stat. L. 483), is as follows:

“(13). When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

“(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under Section 1 of this Act.

" (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

" (c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

" (d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The complaint filed with the Interstate Commerce Commission by the State of New York and its Superintendent of Public Works, a copy of which is set forth as Exhibit B to the petition of the railroad in the District Court, stated in its title and in its prayer for relief that it was a complaint under Section 6, Subdivision 13, of the Interstate Commerce Act. Throughout the complaint no other portion of the Interstate Commerce Act was invoked. (R. 16-18.)

From the report of the Commission, annexed as Exhibit C to the petition of the railroad in the District Court, it will be seen that the Commission, in determining the proceeding before it and in making its order, purported to do so only under Section 6, Subdivision 13, of the Interstate Commerce Act. (R. 27.)

Hence the validity of the Order turns upon whether, in the circumstances, the issuance of the order was a proper exercise by the Commission of its authority under this portion of the Interstate Commerce Act. In stating the question presented by this case, the brief for the United States (p. 2) relies entirely upon paragraph (13) of Section 6. It is therefore unnecessary to consider whether the Commission, as contended at page 25 of its brief, might have made the Order under some other provision of the statute pursuant to which it did not purport to act and as to which the railroad has had no day in court before the Commission.

I. C. C. v. Louisville & Nash. R. R., 227 U. S., 88, 91.

II.

As Section 6, Subdivision 13, of the Interstate Commerce Act confers jurisdiction upon the Commission only "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal, or otherwise, and not entirely within the limits of a single state," the Order is void because it is predicated upon no finding that property is or may be transported in the manner described and because there is no competent evidence to support such a finding.

So the railroad contended below. (R. 8-9.)

Section 6, Subdivision 13, was a new provision added to the Interstate Commerce Act by the Panama Canal Act of August 24, 1912 (37 Stat. L. 556). By its terms it conferred upon the Commission jurisdiction "in addition to the jurisdiction given by the Act to regulate commerce" and Congress definitely provided that these additional powers should be exercised only in the particular conditions which it therein specified.

The first of these conditions is obviously that described in the first sentence of the subdivision, namely, "when property may be or is transported from point to point in the United States by rail and water * * * the transportation being by a common

carrier or carriers and not entirely within the limits of a single state"; and only with respect to "such transportation."

So, before the Commission may assume in any proceeding to exercise any of the powers specified in Section 6, Subdivision 13, it must find, upon competent evidence before it, that property may be or is transported from point to point in the United States by common carriers by rail and by water.

The report of the Commission describes the location and physical characteristics of the Barge Canal at some length (R. 20); describes the docks and piers and tracks of the Erie Basin Terminal (R. 21); and gives a list of the principal canal carriers operating on the canal. (R. 24.) It also gives the number of tons of freight interchanged between canal carriers and lake carriers and the number of tons of local freight handled by canal into and out of Buffalo. (R. 26.) But it makes no finding in so many words that there is any freight which may be or is transported by rail by the railroad, and by water by some common carrier by water, via the Erie Basin Terminal as an interchange point.

If it be urged that such a finding should be inferred from the language of the report as a whole, the answer is, *first*, that it is in direct conflict with the only references, which are to be found in the Commission's report, as to traffic to be interchanged at the Terminal and, *second*, that it is unsupported by any competent evidence of record and is therefore arbitrary.

Louisville & Nash. R. R. v. Finn, 235 U. S.,
601, 607.

To quote from the only reference in the Commission's report to testimony with respect to freight to be handled via the Erie Basin Terminal (R. 26):

"Traffic officials of five of the principal industries at Buffalo testified in behalf of the complainants. Two of them have their own docks, but desire to make less-than-barge shipments via the Erie Basin Terminal. Of the remainder, two have water connection with the terminal, but have no docks at their plants. The traffic manager of the Buffalo Chamber of Commerce estimates that the volume of traffic that would move over the connection,

if the proposed service were established, would range from 100,000 to 125,000 tons per year. One of the principal shippers estimates that its traffic alone would amount to 20,000 tons annually."

There is nothing in the Commission's report to indicate that it has accepted the statements of these witnesses as conclusive, or that it has made a finding in accordance therewith. Other statements of the traffic officers of the five principal industries, mentioned in the portion of the Commission's report above quoted, have been outlined at pages 10, 11 and 12 of this brief. It should be observed that the testimony of all but one (R. 64) of these men was given only at the hearing before the Public Service Commission in 1920; and that three years later, at the hearing before the Examiner of the Interstate Commerce Commission, after the Barge Canal had been in operation for three years and they had had an opportunity to determine whether or not they would have freight to ship by the canal, not one of them reappeared or was recalled as a witness. Therefore so far as the statements of these witnesses are concerned, if any finding is to be inferred from the language of the Commission's report, such finding must be with respect to a condition existing three years before the Interstate Commerce Commission hearing, and more than four years before the date of the Order.

The last sentence above quoted and mentioned at page 7 of the brief for the United States is erroneous, for an examination of the record will show that what this witness testified was not that his company's traffic by the canal would amount to 20,000 tons annually, but that if it had barge facilities it would increase its New York City business from 10,000 to 20,000 tons. (R. 65.)

The Traffic Manager of the Buffalo Chamber of Commerce was the only other witness mentioned in the above quotation from the Commission's report who was called as a witness at the hearing in 1923 before the Interstate Commerce Commission's Examiner. His testimony is summarized at page 12 of this brief. The mere statement by the Commission that "the Traffic Manager of the Buffalo Chamber of Commerce estimates that the volume of the traffic that would move over the connection if the proposed connection were established would range from 100,000 to 125,000

tons per year" certainly cannot be construed as a finding by the Commission that from 100,000 to 125,000 tons would move via the Terminal, and if so construed it would be likewise arbitrary and not a proper foundation for the Order.

So the Commission has made no finding, and there is no competent evidence to support a finding, of the existence of the first circumstance which is made a requisite to the exercise by the Commission of any authority under Section 6, Subdivision 13, of the Interstate Commerce Act, namely, that freight may be or is transported by a common carrier or carriers by rail *and* water via the Erie Basin Barge Canal Terminal. And this is without regard to whether the boat lines now operating on the canal are common carriers by water engaged in such transportation, within the language of the statute—a question which will be considered under the next point in this brief.

III.

It is essential to the exercise by the Commission of the jurisdiction conferred upon it by Section 6 that there be before it and subject to its jurisdiction both the common carrier or carriers by rail and the common carrier or carriers by water which do or may engage in the transportation by rail and water; and there being no common carrier by water subject to the Commission's jurisdiction in the present proceeding, the Commission was without authority to issue the Order.

So the railroad contended below. (R. 9.)

(A) The plain purpose of subdivision 13 of Section 6 is to promote through transportation by rail *and* water; and the accomplishment of this purpose requires that both a common carrier by rail and a common carrier by water be before the Commission and subject to its jurisdiction.

A reading of Subdivision 13 of Section 6 as a whole discloses an intention on the part of Congress to promote through transportation by rail and water. The powers conferred upon the Commission are appropriate to this end. Such being the purpose of the statute, those powers may be exercised only when, and in

such manner that, they will accomplish that purpose. Little public good could be derived from a requirement that freight be transported to a dock, there to be left where it cannot be protected by the rail carrier, and without any assurance that it will be accepted for further transportation by a water carrier. Thus Congress must have intended that the Commission should exercise its powers only when, by so doing, it could bring about an arrangement for through transportation, and obviously, therefore, only when both the rail carrier and the water carrier should be subject to the Commission's jurisdiction.

The statements of the supporter of a statute in advocating its passage, though not permitted to control its construction, may indicate the intention of Congress in the passage of the act.

Jennison v. Kirk, 98 U. S., 453, 459-460;

Standard Oil Co. v. U. S., 221 U. S., 1, 50.

Senator Jones, a member of the Senate Committee on Inter-oceanic Canals, speaking to the Panama Canal bill in committee of the whole on the day final vote on the bill was taken, said (48 Congressional Record 10578, Aug. 9, 1912):

"There are other provisions in Section 11 (which became the portion of the Interstate Commerce Act here in question) that I think really are of greater importance * * *. One of them provides that the Interstate Commerce Commission may establish *through* connection between rail lines and the docks of the water carrier where it is reasonably practicable to do so * * *.

"Then we also provide that the Interstate Commerce Commission may establish through routes and maximum joint rates over a rail-and-water line and determine the conditions under which such lines shall be operated. In other words we place through rates under the control of the Interstate Commerce Commission and require the rail lines and the water lines to make and furnish connections to and with each other * * *.

"We also empower the Interstate Commerce Commission to establish maximum proportional rates by rail to and from ports to which their traffic is brought or from which it is taken by a water carrier. We empower

the Commission to determine upon what traffic these rates shall be laid and the conditions under which they shall apply."

If such was the purpose of Congress in conferring upon the Commission the powers specified in Subdivision 13 of Section 6, then the Commission may exercise those powers only when both a rail carrier and a water carrier are before it; for it is obvious that the Commission cannot create a through route for the transportation of freight by rail and by water unless it has jurisdiction of both the rail carrier and the water carrier. Neither can it bring about an interchange of freight between a rail carrier and a water carrier unless it has before it both the carrier that is to deliver and the carrier who is to receive the freight, for an interchange is by its very name an act which requires the participation of at least two parties.

Congress could not have expected that the Commission, having jurisdiction over through transportation and acting under a provision designed to promote such through transportation, should require a rail carrier to perform a transportation service, deliver freight to a dock and leave it for transportation by the water carrier entirely without regulation or control.

The Order in no way either creates or promotes the through transportation of freight by rail and water. The railroad is required to transport freight to the Barge Canal Terminal, but the order makes no provision as to what shall be done with the freight after it reaches Terminal. No water carrier is required to receive it and transport it to destination. All that the Order purports to require is a local rail transportation service by the railroad to and from the Terminal, a transportation service which may be entirely apart from and unconnected with any through transportation by water.

Since the purpose of Subdivision 13 of Section 6 must be to promote through transportation by rail and water, and since the presence of a common carrier by water in the proceeding is essential to the accomplishment of this purpose, the absence of any common carrier by water subject to the Commission's jurisdiction in the present case is a vital defect which renders the Order null and void.

(B) The various provisions of Subdivision 13 of Section 6 of the Interstate Commerce Act, by their language, clearly require the presence of a common carrier by water, in order to give the Commission jurisdiction to exercise the powers conferred therein.

Under Point II it has been observed that the introductory paragraph of Subdivision 13 of Section 6 of the Interstate Commerce Act provides that the jurisdiction of the Commission under this portion of the Interstate Commerce Act arises only when property may be or is transported by rail and water from point to point in the United States and when the transportation is by a common carrier or carriers. The sentence in question continues: "The Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same." From this it is plain that the Commission has jurisdiction only when the property is to be transported by common carriers by rail and water, but that when this occurs the Commission is to have jurisdiction of both the common carrier by rail and the common carrier by water. Therefore the presence of a common carrier by water is necessary in any proceeding in which the power of the Commission under this portion of the Interstate Commerce Act is invoked, not only to provide evidence of the necessary condition precedent to the exercise of the Commission's jurisdiction, namely, that property may be or is transported by rail and water, but also to give the Commission the jurisdiction which the Act contemplates over the subject matter, namely, over such transportation and the carriers participating therein.

That the presence of the common carrier or carriers by water with which freight is to be interchanged is necessary to the exercise by the Commission of the power conferred upon it by the provisions of the Act in question is clear, also, from the further portions of Subdivision 13 of Section 6 and the character of the Commission's jurisdiction thereunder.

By paragraph (b) the Commission is given authority "to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling

of the traffic embraced." Clearly the jurisdiction conferred by this paragraph can be exercised by the Commission only when both a rail carrier and a water carrier are before it.

Paragraph (c) of Subdivision 13 of Section 6 likewise requires the presence before the Commission of a common carrier by water, for while the Commission is given authority to establish proportional rates by rail to and from the ports it is also "to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply." This it cannot do without having evidence as to the water carriers, and it cannot make any binding determination unless the water carriers operating the vessels are before it.

Paragraph (d), referring to arrangements between a rail carrier and a water carrier for transportation to or from a foreign country, is not pertinent to the present inquiry.

The Commission evidently realized the force of the contentions above made with reference to paragraphs (b) and (c), for its report and Order clearly indicate that the Commission did not purport to act under paragraphs (b) and (c), but solely under paragraph (a). (R. 27.) But the fact that the Order purports to be issued under paragraph (a) of Subdivision 13 of Section 6 does not obviate the objection that no common carrier by water was before the Commission and subject to its jurisdiction.

By paragraph (a) it is provided that the Commission shall have jurisdiction to establish physical connection between the line of the rail carrier and a track or tracks to the dock "by directing *either or both the rail and water carrier*, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock." Since alternative methods of accomplishing this result are provided, the Act clearly contemplates a decision as to which of such methods shall be employed, but, in order to decide whether the connection should be constructed by the rail carrier or by the water carrier or by them both jointly, the Commission must have both carriers before it. This is emphasized by the next provision which directs that the Commission "shall have full authority to determine and prescribe the terms and conditions under which these connecting

tracks shall be operated," and by the further clause providing that the "Commission may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by *either carrier*." How can the Commission prescribe the terms and conditions, or determine what sum shall be paid to or by either the rail carrier or the water carrier, unless both carriers are before it? In the present case, as the connection had already been constructed (R. 17, 25, 104, 107), the Commission was not called upon to act under the first provision. The action of the Commission, therefore, can be said to proceed only under the latter provision of paragraph (a) which most clearly requires that a water carrier be a party to the proceeding.

Hence a reading of paragraph (a) alone does not support the Order.

But paragraph (a) is to be read in connection with the entire Subdivision 13 of Section 6 and construed accordingly. As the real purpose of this subdivision is the establishment of through routes over rail and water lines, the establishment of proportional rates by rail and the fixing of the terms and conditions by which traffic shall be handled by water (in other words to provide for through rail and water transportation), the acts mentioned in paragraph (a) are merely acts preliminary to the accomplishment by the Commission of the general purpose of Subdivision 13, and unless the Commission is in a position to carry out the purposes of the entire subdivision it is without any authority under paragraph (a).

That this is so is borne out by the language of paragraphs (b) and (c) of Subdivision 13 of Section 6, which certainly suggests that the Act is to be treated as a whole and that the exercise of the jurisdiction conferred by any of its provisions requires the presence before the Commission of a particular common carrier by water with whom the freight is to be interchanged. Paragraph (b) plainly requires the presence of a water carrier before the Commission, because the Commission is to establish through rates over rail and water carriers. The water lines are described in paragraph (b) as *such* water lines, indicating that they are the water lines mentioned in previous provisions. Again, the juris-

diction conferred by paragraph (c) requires the presence of a water carrier before the Commission, because the Commission is to determine in connection with what vessels the rates shall apply. Here the language used is "*the* water carrier." Use of the word "the" indicates both that the reference is to the water carrier mentioned in previous paragraphs of the subdivision, and also that the particular water carrier with which interchange is to be made must be before the Commission. Otherwise Congress would have empowered the Commission to establish proportional rates by rail to and from the dock from and to which traffic is taken by *any* water carrier.

So the entire language of Subdivision 13 of Section 6 requires the conclusion that the Commission is authorized to exercise the powers enumerated therein only when there are before it, and subject to its jurisdiction for the purposes thereof, the common carrier or carriers by water, as well as the common carrier or carriers by rail, who engage or are to engage in the through transportation of freight by rail and by water.

In none of the many rate cases cited at pages 14 and 15 of the brief for the United States, in support of the undeniable proposition that a State, under proper circumstances, may be a complainant before the Interstate Commerce Commission, was there absent a common carrier with which it was sought to establish reciprocal rights and liabilities to maintain an interchange of transportation facilities.

(C) The Interstate Commerce Commission has itself heretofore exercised the powers conferred upon it by Subdivision 13 of Section 6 of the Interstate Commerce Act in cases where both the rail carrier and the water carrier, between which it was sought to have freight interchanged, have been before it.

This is the first instance which we have been able to discover where the Commission has assumed to enter an order against a rail carrier, where the carrier by water, with which the interchange of freight was sought to be required, has not likewise been before the Commission. The proceeding has usually been instituted by the water carrier on a complaint praying that the Com-

mission require the rail carrier to participate in through transportation with the water carrier.

In Re Wharfage Facilities at Pensacola, Fla.,
27 I. C. C., 252;

*Baltimore & Carolina S. S. Co. v. A. C. L. R.
R. Co.* 49 I. C. C., 176;

*Colonial Navigation Co. v. N. Y. N. H. & H.
R. R. Co.*, 50 I. C. C., 625;

In the first of the cases above cited the Commission said (p. 259):

“The Act to regulate commerce, especially as amended by the provisions of the Panama Canal Act above quoted, brings the regulation of these facilities within the jurisdiction of the Commission, and imposes upon it the duty of determining what vessels should use these facilities and the terms and conditions of such use.”

What clearer indication could there be that the Commission construed the Act as requiring the water carriers to be before it? How otherwise would it be possible to determine what vessels should use the facilities in question, namely, the docks at which interchange was to be made?

Pertinent is the Commission's decision in *Charleston & Norfolk S. S. Co. v. C. & O. Ry Co.*, 40 I. C. C., 382. The complaint there was filed by a corporation which claimed to be organized to operate as a common carrier by water, and which sought an order of the Commission, under paragraph (c) of Subdivision 13 of Section 6, requiring the rail carrier to establish proportional rates, to and from an interchange point with the boat line, on traffic to be handled in connection with the boat line and other boat lines which might be operated between the points named. The Commission declined to make the order, holding that it was without jurisdiction for the reason that the complainant owned no vessels and was not yet equipped as a common carrier to interchange freight with the railroad.

(D) No common carrier by water was properly before the Interstate Commerce Commission in this proceeding and subject to its jurisdiction.

The only parties to this proceeding before the Commission, at its beginning, were the State of New York, the Superintendent of Public Works of the State of New York, and the railroad. While the State of New York constructed and owns the Barge Canal and the Erie Basin Terminal, it is not a common carrier by water. (R. 97; *People ex rel. N. Y. C. R. R. Co. v. Pub. Serv. Comm.*, 198 App. Div., 436, 438.) There is no evidence and no contention is made that the Superintendent of Public Works operates vessels on the Barge Canal as a common carrier. The same is true of the railroad. At the outset of the case before the Commission the railroad insisted that there was a complete absence of any common carrier by water as a party to the proceeding. (R. 50, 55, 76.)

The only attempt to remedy this situation was the filing by the Deputy Attorney-General of the State, at the first hearing before an Examiner of the Interstate Commerce Commission, of a petition of intervention on behalf of two corporations alleged to operate boats upon the canal. The Examiner allowed the intervention and also ruled that these boat lines might be made parties complainant. (R. 55-56, 63.)

The railroad urged, in opposition to the intervention, that, since previously there was no common carrier by water before the Commission, there was no cause of action alleged under Subdivision 13 of Section 6 of the Interstate Commerce Act and therefore there was no pending proceeding in which the intervention might be permitted; also, that new issues would be presented, which the railroad should have an opportunity to meet. (R. 55-56, 63.)

However, assuming that, after some fashion, these two alleged water carriers became parties to the proceeding before the Commission, although they have not felt sufficiently concerned to exercise their right under Section 212, Judicial Code, to intervene in this suit (*Chicago Junction Case*, 264 U. S., 258, 267), it does not follow that this cured the defect in the cause of action.

There is no indication that these two water lines submitted themselves in any way to the Commission's jurisdiction. At most, they intervened to express their interest in the outcome, but with no intention that the Commission should deal at all with them in respect to the interchange of freight or fixing the terms and conditions of such interchange. Certainly it was not with any intention that the Interstate Commerce Commission should take steps toward the establishment of arrangements for through transportation over their lines, for the Deputy Attorney General of New York, who appeared also as their counsel (R. 74), said (R. 64):

"Through routes and joint rates are not asked for at this time."

The representative of one of these companies, called as a witness on behalf of the complainant, stated that he did not even know the status of his company in this proceeding. (R. 71.)

If these two companies be treated as complainants and their petition for intervention be regarded as a complaint, then it will be observed that it prays for no relief with respect to them. Paragraph 2 of their petition states (R. 78) "that it is essential to their business that they should be able to interchange traffic with the defendant," but in their prayer they ask only for leave to intervene and participate; they do not pray that the railroad be required to interchange freight with them or that the Commission fix the terms and conditions of such interchange. Whatever be their status upon the pleadings, there is no evidence of record with respect to their financial condition or their ability to participate in the interchange operations; nor is there any evidence upon which, even with respect to these two alleged water carriers, the Commission would be justified in fixing the terms and conditions under which the Erie Basin Terminal should be operated or freight interchanged or transported by rail and water.

Finally, the presence of these two water lines, in whatever capacity in this case, in no way affects the situation, since they are not, and do not seek to become, "common carriers by water" subject to the Commission's jurisdiction under the provisions of the

Interstate Commerce Act. Their boats or barges appear to be of that "tramp" class mentioned in the concurring opinion of Mr. Commissioner Eastman (R. 33) and in the dissenting opinion written by Presiding Justice Kellogg when this matter was before the New York courts (198 App. Div., 436, 444).

This is the view urged by Mr. Chairman Hall in his dissenting opinion (R. 43), in which Mr. Commissioner Potter concurred. Mr. Chairman Hall develops his theory to the point that the Commission's jurisdiction under Section 6, Subdivision 13, exists only when there are before it both a rail carrier and a common carrier by water subject to the provisions of the Interstate Commerce Act within the definition contained in Section 1 of that Act. (R. 44.)

From the standpoint of proper statutory construction this position is sound. Subdivision 13 of Section 6 was added as an amendment to the Interstate Commerce Act by Section 11 of the Panama Canal Act (37 Stat. L. 568), approved August 24, 1912. With this subdivision thus already included in the Act, Section 1 of the Interstate Commerce Act was re-enacted by Section 400 of Transportation Act, 1920, in somewhat revised form (41 Stat. L. 474). So that the first two paragraphs of Section 1 read as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment."

Paragraph 3 of Section 1, as likewise re-enacted, contains this clause:

"Whenever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.'"

The introductory paragraph of Subdivision 13 provides that the Commission's jurisdiction of the transportation therein described "and of the carriers, both by rail and by water," which

engage in the same, shall be "in addition to the jurisdiction given by the Act to regulate commerce." If this jurisdiction is to be *in addition* to the jurisdiction which the Commission already had over the common carriers named, then the Commission must before have had some jurisdiction of such common carriers. The only carriers by water over which the Commission previously had jurisdiction were those which were engaged in rail and water transportation "under a common control, management or arrangement for a continuous carriage." It is therefore only as to such carriers that the power now given to the Commission by Subdivision 13 can be exercised.

In his concurring opinion Mr. Commissioner Eastman takes issue with the views of Mr. Chairman Hall, upon the ground that, if the provisions of Subdivision 13 of Section 6 are so construed, the purpose of these provisions will be nullified, since under such construction the Commission will have jurisdiction only when there is already an arrangement for a continuous carriage by rail and water or when both carriers are under common management or control, and under these circumstances there will probably be no necessity for invoking the Commission's jurisdiction to require the carriers to provide interchange facilities. (R. 31-32.) The argument is fully met in the dissenting opinion of Chairman Hall. (R. 39-42.)

IV.

The Order far transcends the jurisdiction conferred upon the Commission by Subdivision 13 of Section 6, which is only with respect to the transportation of property by common carriers by rail and water between points in the United States and not within the limits of a single state. Hence it is null and void.

So the railroad contended below (R. 12):

Under our Point II it is urged that, in view of the language of the introductory paragraph of Subdivision 13 of Section 6, the jurisdiction of the Commission to exercise the powers therein granted to it arises only when property is or may be transported

from point to point in the United States by common carriers by rail and water. This same introductory paragraph provides that the jurisdiction which is conferred upon the Commission by Subdivision 13 is "jurisdiction of *such* transportation * * * in the following particulars." Paragraphs a, b, c and d, describe the particulars of the jurisdiction, but these particulars exist only with respect to the transportation described in the introductory paragraph. The Order, however, purports to be an exercise of power with respect to transportation other than that which comes within the terms of the introductory paragraph.

(A) The Order is not limited to transportation from point to point by common carriers by rail and water within the provisions of the Interstate Commerce Act.

It relates to transportation by rail only to or from the Terminal, and by its terms the railroad is required to perform the transportation service with respect to all traffic "that may be transported to or from said Terminal over said defendant's line." (R. 54.) This may well include freight to be delivered to the Terminal for some purpose other than transportation thence by water, or freight which has arrived there in some manner other than by water carrier.

(B) The Order is not limited to transportation of freight from point to point in the United States.

It purports to require the railroad to perform the transportation service described therein with respect to all traffic that may be transported to or from the Erie Basin Terminal. This may include freight which has arrived at the Terminal by water from Canada, or which is destined to a point in Canada. Subdivision 13 of Section 6 clearly gives the Commission no jurisdiction to require such transportation.

(C) The Order is not limited to transportation of freight "not entirely within the limits of a single state."

In its comments upon the clause numbered 3 on page 28 of its brief, the United States refrains from discussion of the phrase last quoted.

Although Subdivision 13 of Section 6 expressly states that the jurisdiction conferred is with respect to transportation "not within the limits of a single state," the Order (R. 54) directs that the transportation service therein required shall embrace "all traffic interstate and *intrastate*," a provision which the Government essays to defend in Point V (page 43) of its brief. The reason for this is doubtless to be found in the decision of the New York courts in *People ex rel. New York Central Railroad Company v. Public Service Commission* (198 App. Div., 436; *aff'd* 232 N. Y., 436), wherein it was held that the State Commission was without authority to order the railroad to perform a transportation service to and from and upon the Erie Basin Terminal, basing the decision upon the ground that the Federal government, by the enactment of Subdivision 13 of Section 6 of the Interstate Commerce Act, had occupied the entire field of regulation of interchange facilities for the interchange of freight between rail and water carriers.

(D) The Order requires the railroad to perform transportation service between the Erie Basin Terminal and points and shippers located on the lines of the railroad's connections.

It is difficult to see how the railroad can be required to perform a transportation service between the Erie Basin Terminal and points on the lines of its connections. Certainly such transportation service cannot be required under the Act, without the presence in the proceeding of those connections. Yet the Order purports to require such transportation. Indeed, the second paragraph of the Order defines the transportation service which the Order requires as including "the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the Terminal and the points and shippers aforesaid." (R. 54.)

V.

The Order cannot be sustained as a determination and prescription of the terms and conditions upon which connecting tracks shall be operated, for in substance it requires the railroad to extend its line.

So the railroad contended below. (R. 10-12.)

The Order purports to require the railroad not only to perform a transportation service between points on its line and the track connecting with the tracks upon the Erie Basin Terminal, but to "perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary," etc.; and the service is defined as including "the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing and removal of such cars therein and therefrom." (R. 54.)

Apparently the Commission assumed to act under that portion of paragraph (a) of Subdivision 13 of Section 6 which authorizes the Commission to prescribe the terms and conditions of operation of a connecting track. In its report (R. near bottom of each of pages 28 and 29) the Commission declared that the relief sought was limited to a transportation service and an operating service.

(A) The Order does not direct or prescribe the terms and conditions of operation.

An order merely directing the railroad to operate the tracks is in no sense an order determining and prescribing the conditions of such operation. The Commission has not determined the terms and conditions of operation as between the railroad and a water carrier. That it could not do because no water carrier is party to the proceeding. Nor does the Order in any way prescribe the terms and conditions under which the railroad shall operate the tracks. Under the circumstances this is an important omission. The tracks are located entirely upon the property of the State of New York. By Chapter

746 of the Laws of 1911 of the State of New York it is provided that the Barge Canal Terminals shall include all tracks upon the terminals, and that the terminals shall be operated and forever remain under the management and control of the State. By Section 15 of that statute the Canal Board is authorized and directed to prescribe rules and regulations for the use of the terminals, but it is provided further that "any use or occupancy of the tracks of any terminal by any railroad car in excess of the time actually necessary to load, unload or immediately reload any such car, or any use or occupancy of the terminal by goods, merchandise or freight, or by vehicles bringing freight to or taking freight from any terminal in excess of that actually necessary to the receipt, shipment or transfer thereof, shall be deemed a misuse of such terminal, and any such car, goods, merchandise, freight or vehicles may be summarily removed from the terminal by the Superintendent of Public Works, or by any officer, agent or employe acting under him, and no claim for damages shall be enforceable against the State of New York." (R. 13.)

The Order requires the railroad to enter upon the terminal with its cars and locomotives, subject to the risk of liability for violating the State law above quoted. No provision is made by the Order for the unloading of the cars after they are placed upon the Terminal by the railroad, or for the disposition of the freight contained therein. Yet, under the State law, the railroad's cars and the freight which the railroad has transported to the Terminal are liable to be removed summarily by the State, to the possible damage of the railroad without any redress against the State.

If the railroad, in operating these tracks, is to have as protection against an alleged violation of the State law the defense that such operation is pursuant to an order of Federal authority, such order should definitely specify the terms and conditions of operation, in order thus to supersede the requirements of the State law.

Because the tracks and the entire terminal facilities are the property of the State, there should be a determination of the rights and duties of the railroad and of the State with respect thereto, and all terms affecting the use of the tracks should be fixed before the railroad is required to enter thereon.

The very facts that the tracks are not upon the railroad's property, that the railroad has no control over the condition of such tracks, and that it has no means of protecting its cars and the freight transported by it from possible injury from other activities conducted upon the Terminal, make it essential, if operation is to be required, that the conditions of such operation be thoroughly specified, and emphasize the degree to which the Order fails to constitute a prescription of any terms and conditions of operation.

Significant is a decision of the New York courts in *People ex rel. Erie Railroad Co. v. Public Service Comm.*, 176 App. Div., 28; affirmed in 220 N. Y., 674, on opinion below.

A track extended from the line of the Erie Railroad to a plant one-quarter of a mile from its station, the track being 479 feet in length from the switch connection. The railroad company had formerly operated the switch connection and track, but it refused to continue to do so unless the owner of the plant would execute an agreement fixing the terms and conditions of operation and the responsibilities of the parties with respect to damage to property, persons, etc. The Public Service Commission found these proposed contract provisions unreasonable and ordered the railroad to tender another agreement with modified provisions and in the meantime to continue to operate the track. This order was brought to the Appellate Division for review on writ of certiorari. The court held the order invalid, saying (p. 31):

"A railroad company cannot control the property of the shipper and if it operates a railroad on the property of the latter it is powerless to take such precautionary measures or establish such rules and regulations as it may think advisable to minimize the possibility of accident and lessen its liability therefor. This side track in question being on the property of the machine and knife works is not within the control of the railroad company, and accidents and liabilities may arise which could be obviated if the railroad company had the sole control and possession thereof."

(B) The tracks upon which the railroad is directed by the Order to operate not being "connecting tracks," within the meaning of Subdivision 13 of Section 6 of the Interstate Commerce Act, the operation ordered by the Commission amounts in effect to an extension of the railroad's line, which the Commission by this section of the Act is not authorized to require.

Even if the Order could be construed as a prescription of the terms and conditions of operation of the tracks therein described, nevertheless the order cannot be sustained as an exercise of authority under Paragraph (a) of Subdivision 13 of Section 6, since these tracks are not tracks with respect to which Paragraph (a) authorizes the Commission to prescribe the terms and conditions of operation.

The statute provides that the Commission shall have authority to determine and prescribe the terms and conditions "upon which *these connecting tracks* shall be operated." Whether the Order can be sustained as an exercise of this authority depends upon the meaning of the words "these connecting tracks," and whether that meaning embraces the tracks described in the Order.

Assuming for the moment that the tracks which the railroad is directed to operate may be considered as connecting tracks, within the meaning of paragraph (a) of Subdivision 13 of Section 6, *the first reason* why the Order cannot be defended as an exercise of the authority conferred upon the Commission by that paragraph is, that the tracks over which operation is ordered are not tracks which have been constructed subject to an order of the Interstate Commerce Commission or subject to its approval. The first sentence of Paragraph (a) authorizes the Commission to require the construction of certain tracks. The second sentence, pursuant to which presumably the Order was made, authorizes the Commission to prescribe the terms and conditions of operation of "*these connecting tracks*." Obviously, this means the tracks which the Commission has ordered to be constructed. The reason for this restriction of the Commission's authority is a substantial one. The proviso to Paragraph (a) limits the track construction which the Commission may require by providing that this construction

"shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under Section 1 of this Act." This proviso is not copied at page 26 of the brief for the United States, its omission being represented by * * * at the end of clause (c); nor is it copied at the end of the sixth line on page 31 of that brief. By Section 1 it is provided that the Commission must find that present or future public convenience or necessity requires or will require the construction or operation or construction and operation (Sec. 1, Par. [18]), and that the expense involved will not impair the ability of the carrier to perform its duty to the public (Par. 21.) Thus by limiting the power of the Commission to deal with the operation of tracks to tracks the construction of which the Commission has required or approved, and by making the requirement of such construction subject to the restrictions as to findings of public convenience and necessity and reasonable expense, Congress has, in effect, safeguarded the public and the railroads from any danger that a railroad may be required to operate tracks where such operation or construction is not in the public interest.

The tracks which the Order requires the railroad to operate were not constructed pursuant to an order of the Commission. They were constructed by the State of New York and were already in existence at the time the Order was made. So they are not tracks with the operation of which the Commission is authorized to deal under Paragraph (a) of Subdivision 13 of Section 6.

The second reason why the tracks described in the Order do not come within the terms of the statute is that they are not "connecting tracks," as that term is there used, or as it should be construed.

Paragraph (a) authorizes the Commission "to establish physical connection between the lines of the rail carrier and the dock * * * by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way." The Commission is also authorized to direct the rail and the water carrier "to construct and connect with the lines of the rail carrier

a track or tracks to the dock." The connection with the track of the rail carrier is that portion of the track which is necessary to join whatever tracks there may be upon the dock with the line of the rail carrier. It is this connection with respect to which the Commission is empowered to prescribe the terms and conditions of operation. Plainly this is a reasonable construction, since it is at the connection alone that the interests of the rail carrier and the water carrier are apt to interfere, assuming that the tracks on the dock are operated by the water carrier as is normally the case.

The Order requires the railroad to operate much more than the connecting track, since it requires it to operate *all* the tracks within the Terminal. The Order, in requiring the railroad to operate not only the connection between its line and the track or tracks to the dock, but the tracks within the Terminal, in effect is not a determination of the conditions of operation of a "connecting track," but constitutes a requirement that the railroad make an extension of its line. The railroad's line does not extend beyond its right of way and the railroad's public undertaking, as defined in its tariff, does not include the transportation of freight from the right of way to a point within the Erie Basin Terminal, much less the switching and other operations necessary to the movement of freight between points within the Terminal. To require the railroad to operate upon tracks which it does not own, and over which it has no control, is to require it to make an extension of its line beyond its present undertaking.

The use of the words "these connecting tracks" in Subdivision 13 of Section 6 and the difference between the meaning of this term and an extension of a line of railroad are emphasized by the fact that under Transportation Act, 1920, a sharp distinction is made between a connecting track and an extension. The term "extension" is used in Section 1 of the Act, and whatever power the Commission has with respect to extensions is derived from the provisions of that section which was not invoked for the purposes of the Order. That the power to regulate *extensions* of railroads is an extraordinary power is emphasized by the fact that paragraph (21) of Section 1 clearly provides that the Commission must make certain very definite findings of public convenience and

necessity, and that it must also find that the construction or operation of the extension will not place such a burden upon the railroad as will interfere with the proper performance of its common carrier undertaking with respect to other traffic. No such issue was before the Commission, whose answer (R. 47) states that its report fully sets forth the issues which it determined.

The distinction between connecting tracks and extensions was clearly pointed out by *Railroad Comm. v. Southern Pacific Co.*, 264 U. S., 331, where this Court, holding that whether or not a particular track is an extension of a carrier's line of railroad is not to be determined by the length of that track, said (pp. 346-347):

"The extensions of the lines and main tracks of these railways under the plan which the State Commission has ordered are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers. Great expense attends such changes of the main tracks in a crowded city, and they here carry with them, as necessarily incident thereto, the abandonment of available sites and of valuable existing passenger and freight stations and the construction of a new union station elsewhere, imposing on the three railways a cost in making the changes of from twenty-five millions to forty-five millions of dollars. We think it clear that in such an extension of main lines with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public."

The distinction had also been stated in *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S., 510, where it was said (p. 528):

"6. Since the decision in *Wisconsin, etc., R. R. v. Jacobson*, 179 U. S. 287 (invoked at p. 24 of the Commission's brief herein), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other."

In March last this Court declared:

“ If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction.”

Texas & Pac. Ry. v. Gulf, &c. Ry., 270 U. S.,
266, 278.

The railroad has never undertaken to perform a transportation service within the Erie Basin Terminal, the tracks within which are the property of the State. To require it now to operate those tracks is, therefore, to compel it to go outside of its common carrier's undertaking, to extend its line of railroad and to use its facilities for purposes beyond its public profession. The decision of the Court of Appeals of New York in *N. Y. C. & H. R. R. R. Co. v. General Electric Co.*, 219 N. Y., 227 (certiorari denied in 243 U. S., 636), sustains this proposition, that while the railroad has undertaken to transport freight to and from Buffalo, which transportation involves making delivery to consignees and receiving freight from shippers at Buffalo, the duty to deliver and to receive involves no more than the delivery or the receipt of cars on the interchange track connecting with its line, and does not involve an undertaking or a duty to *spot cars* within the Terminal or to switch from one point to another within the Terminal. So the Court of Appeals decided, holding that a carrier had performed its duty in making delivery to an industry when it placed cars upon the interchange track, and that it could not be required to do the switching upon the tracks within the industry's enclosure.

CONCLUSION.

For the reasons set forth in this brief, in the petition to the District Court, in the opinion of JUDGE HOUGH (quoted at length at pages 38-42 of the brief for the United States), and in the dissenting opinion of Chairman HALL, the Commission exceeded the authority conferred upon it by Subdivision 13 of Section 6 of the Interstate Commerce Act, pursuant to which alone the Order was made; the Order is null and void; and its enforcement was properly enjoined by the District Court, whose decree should be affirmed.

Dated New York, N. Y., October 25, 1926.

Respectfully submitted,

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